No. 14

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964

FIBREBOARD PAPER PRODUCTS CORPORATION
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STEELWORKERS OF AMERICA AND ITS AFFILIATED LOCAL UNION 1304, EAST BAY UNION OF MACHINISTS

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Ave., N. W.
Washington, D. C. 20036

JAY DARWIN
Darwin, Rosenthal & Leff
68 Post Street
San Francisco, California

Attorneys for
United Steelworkers of America

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STATEMENT OF THE CASE

Since the Petitioner's Brief contains only a sketchy statement of the facts of this case, we will restate them here in somewhat more detail.

1. *The Events Preceding Contracting Out*

The United Steelworkers of America, AFL-CIO, together with its affiliated Local Union 1304, East Bay Union of Machinists (hereinafter jointly referred to as the Union), was, until the events of this case, the exclusive bargaining representative of a unit of maintenance employees of Fibreboard Paper Products Corporation (hereinafter referred to

as the Company) at its Emeryville, California plant. The unit consisted of maintenance mechanics and machinists, their helpers, working foremen, firemen and engineers in the powerhouse, and a storekeeper in the central supply and store room. (R. 46)

In 1959, there was in effect between the parties a collective bargaining agreement, which provided that either party could seek to terminate or modify the agreement by sending 60 days' written notice prior to July 31, 1959. It further provided that any party sending such a notice must, within 15 days thereafter, submit to the other party "a complete and full list of all proposed modifications," and that "negotiations shall commence no later than forty-five (45) days prior" to July 31. (R. 47).

Pursuant to this provision, the Union, on May 26, 1959, notified the Company of its desire to modify the agreement. The Company, in a letter dated June 2, acknowledged receipt of the Union's notice and stated that "we will contact you at a later date regarding a meeting for this purpose." (R. 153)

On June 15, in accordance with the agreement, the Union sent the Company its list of proposed modifications of the agreement. (R. 153-55)

Despite its statement that it would do so, the Company did not contact the Union to set a meeting date. The Union made several efforts to schedule a meeting, all of which were unsuccessful. (R. 49)

The reason for the Company's evasion of the Union soon became apparent. After receiving the Union's contract demands, the Company began to update certain studies—which had been initiated sometime earlier and then abandoned—to determine whether its maintenance work could be performed at lower cost by using the employees of an independent contractor. As a result of these studies, the Company concluded that it could save a substantial sum of money by terminating all of the employees represented by

the Union, and engaging a contractor to perform their work. (R. 57-58)

At no time during the period that the Company was making these studies did it inform the Union that it was considering contracting out its maintenance work. Finally, on July 27, just four days before the July 31 deadline, the Company's director of Industrial Relations, Mr. Thumann, arranged a meeting with the Union's chief representatives for that evening. At that meeting, Thumann gave the Union representatives a letter announcing that Fibreboard had "reached a definite decision" to contract out its maintenance work effective August 1, 1959, and that "negotiations for a new contract would be pointless." (R. 155-56)

Mr. Thumann then proceeded to describe the "termination" benefits which Fibreboard intended to provide the employees who would be displaced. He stated that a contractor had not yet been chosen, but that he would inform the Union when that decision was made. The meeting concluded with the understanding that the parties would meet again on June 30.

The next day, Mr. Thumann notified the Union that the contract had been awarded to Fluor Maintenance, Inc. (R. 51).

On July 29, the Union wrote a letter to the Company in which it asserted that there was still an agreement in effect between the parties, that the Company had not given any 60-day notice of its desire to cancel that agreement, and that according to its terms the agreement would remain in effect for another year, subject only to the Company's duty to bargain with respect to the modifications proposed by the Union (R. 51).

On July 30, a meeting between the Union's negotiating committee and a Company committee took place. At the beginning of that meeting, Mr. Thumann handed the Union committee a letter responding to the Union's letter of the previous day. In it, the Company took the position that the

agreement would automatically expire on July 31, that the agreement did not in any event prohibit the contracting out of work, and that "since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless" (R. 52-53). The Union committee then stated that it wished to negotiate with respect to its proposed modifications of the agreement, but the Company adhered to its position that this would be "pointless" (R. 84).

When asked to explain the reasons for its decision, Mr. Thumann stated that he had on several occasions in the past explained to the Union, with the aid of charts and statistics, "just how expensive and how costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant." He also stated that "other unions on that property had joined hands with management in an effort to bring about an economical and efficient operation" and that "we had not been able to attain that in our discussions with this particular Local" (R. 85).

In reply to a proposal that the Company arrange to have members of the Union perform the maintenance work as employees of the contractor, Mr. Thumann stated, "that could not be done as we had entered into this contracting of maintenance work for economy and efficiency of operation, and for us to tie the contractor's hands in any fashion, shape, or form would be senseless" (R. 89). He did suggest, however, that the former Fibreboard employees could apply individually for employment with Fluor. He said that he had informed Fluor that "we have some very capable maintenance people in all crafts," and that Fluor had indicated that it was willing to consider hiring former Fibreboard employees (R. 88).

At the conclusion of the meeting, Mr. Thumann wrote on the attendance sheet, next to the names of the management representatives:

> "These representatives of Fibreboard are not in attendance for Contract Negotiations but to restate their opinion that negotiations for a new contract would be pointless in view of management's intention to contract out powerhouse and maintenance work" (R. 159, 89).

On July 31, each maintenance employee was given a notice of termination (R. 56). Since that time, the maintenance work has been performed by the employees of Fluor Maintenance, Inc.

2. *The Nature of the Contracting Out*

In view of the nature of the argument made by Petitioner, and the *amici*, it is important to emphasize exactly what the "contracting out" in this case actually was.

The work which the Company "contracted out" was the maintenance of its production equipment and the operation of its power plant. This work, of course, had to be performed so long as the Company continued its manufacturing operations. And it had to be performed at the plant site; it could not be sent out for performance at another location. Nor did Fluor have any advanced equipment with which to perform the work more efficiently than Fibreboard. Indeed, the work was to be performed with Fibreboard's tools and equipment, and under Fibreboard's general supervision.

In short, the sole effect of the contracting out arrangement was that Fibreboard's work was to be performed on Fibreboard's premises in the same way, and with the same equipment, as before—but by Fluor's employees instead of Fibreboard's employees.

This is fully demonstrated by two documents in the record: Fluor's formal proposal to Fibreboard (R. 139) and the actual contract which was executed August 4 (R. 163). These documents show that Fluor's role was essentially that of a labor broker. It undertook only one basic obligation: to "furnish all labor, supervision, and office help required for

the performance of maintenance work, operation of the boiler plant, and minor alteration and minor construction work . . . as Owner shall from time to time assign to contractor . . ." (R. 160). Fluor also agreed to furnish, at Fibreboard's expense, such tools, supplies and equipment as Fibreboard ordered, "it being understood, however," that Fibreboard "shall ordinarily do its own purchasing of tools, supplies and equipment" (R. 160).

Fibreboard agreed to reimburse all of Fluor's costs, including wages, fringe benefits, payroll taxes, travel and subsistence expenses, utilities, telephone, telegraph, stationery, Workmen's Compensation insurance, permits, licenses, fees, and such tools and equipment as Fibreboard did not furnish. In addition, Fibreboard agreed to pay Fluor a fixed fee of $2250 per month ($27,000 per year) (R. 161-62). The contract was terminable by Fibreboard at any time upon sixty days' written notice (R. 160).

Fluor made clear in its proposal that its personnel would work entirely under the direction of Fibreboard's management. Thus, it stated:

> "We propose that our day-to-day operations will be a functioning component of your organization, subject to your over-all direction. Further, we propose that the inspection of our work completions would be under the direction of Fibreboard" (R. 145).

It also stated:

> "Our superintendent will, in all practical purposes, report to Fibreboard plant management. He will become an integral part of your operating organization and will work energetically and cooperatively toward accomplishing your management orders and objectives" (R. 141).

Finally, it stated:

> "Our recommendations for supervisors are always submitted to your management for consideration and

> appraisal of their background of experience and qualifications before any assignments are made. The number of supervisors and office overhead is always under your direct control and subject to your approval in accordance with the assigned work load. This force is quite flexible and subject to modification to meet the day-to-day efficiency requirements" (R. 140-41).

The question naturally arises, if Fluor was to do the same work with the same equipment as Fibreboard's employees, what was the source of the saving which Fibreboard hoped to gain from this arrangement? The answer is that Fluor's employees were willing to work at less costly terms and conditions of employment than had been negotiated between Fibreboard and its own employees.

Fluor, in its proposal, emphasized the advantageous relationships it had with certain labor organizations, and tendered to Fibreboard a sample of the type of labor contract which it had negotiated elsewhere, and which it had been assured of obtaining for Fibreboard as well. It pointed out in detail the advantages which such an agreement would provide:

> "This type of labor contract makes available the skilled craftsmen who are familiar with maintenance and construction work but eliminates many of the labor problems when owners perform maintenance with their own crews or with subcontractors who use Building Trades working conditions. Examples of benefits in this type of proposed contract are:
>
> "Elimination of most of the fringe benefits, such as travel time, subsistence, vacation pay, sick leave, termination pay, paid holidays, etc.
>
> "We retain the right of complete selection and determination of a craftsman's ability and production.
>
> "Right to terminate employees or reduce work forces at any time.

"Mixed crew assignments with considerable jurisdictive assignment latitude.

"Elimination of any work quotas or work slowdown methods.

"Maximum utilization of man-hour savings, tools or equipment.

"Right to enforce high rates of production from all maintenance employees" (R. 146-47).

Fluor also stated that "labor has assured us of a cooperative endeavor that will give us greater production through our labor forces which will result in giving Fibreboard a lower cost on their maintenance work" (R. 147).

When the Company states that it contracted out its maintenance work for "economic" reasons, these are the considerations it is referring to.

3. *The Proceedings Below*

Upon charges filed by the Union, the NLRB's Regional Director issued a complaint alleging that the Company, by its action, had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act (R. 5). The matter was heard before Trial Examiner Howard Myers, who, on November 27, 1959, issued an Intermediate Report and Recommended Order, recommending that the complaint be dismissed. (R. 44).

On March 27, 1961, the Board issued its first Decision and Order (R. 35), in which it affirmed the decision of the Trial Examiner and dismissed the complaint. On the question of whether the Company had a duty to bargain with the Union concerning its decision to terminate the employees and contract out their work, the Board held that the termination of employment is not, in itself, a matter for bargaining. The Board reasoned that an employer is required to bargain as to which employees shall be selected for termination, or what benefits employees will receive upon termination, but not as to whether or not employees will be

terminated. The Board conceded that there were cases holding that there is a duty to bargain with respect to the elimination of jobs, but concluded that that duty exists only where such action has an effect on employment conditions of employees remaining in the unit, not when all the jobs in the unit are to be eliminated.

In other words, the Board's original decision held that an employer must bargain with the representative of his employees when he proposes to contract out *part* of a bargaining unit, but not when he proposes, as here, to contract out the work of an *entire* bargaining unit.

Member Fanning wrote a dissenting opinion (R. 39) which rejected this distinction, and expressed the view that the termination of employees and elimination of jobs is a subject with respect to which an employer is always required to bargain.

Both the Union and the Board's General Counsel petitioned for a reconsideration of the decision. In September, 1962, the Board issued its Supplemental Decision and Order (R. 19), in which it reconsidered that portion of its original decision dealing with the Company's alleged violation of the statutory duty to bargain, and held that the Company had violated that duty by terminating its mainenance employees, and contracting out their work, without prior bargaining with the Union. The Board relied on its intervening decision in *Town & Country Mfg. Co.* 136 N.L.R.B. 1022 (1962), in which it had held that the contracting out of work is a matter with respect to which employers are required to bargain, as well as this Court's decision in *Order of R. R. Telegraphers* v. *Chicago & N. W. R. R.*, 362 U. S. 330 (1960).

Member Rogers dissented (R. 28), adhering to the views expressed in the Board's original decision.

In fashioning a remedy for Fibreboard's refusal to bargain, the Board noted that it would be futile simply to order the Company to bargain about a *fait accompli*. Accord-

ingly, it ordered the Company to resume its maintenance operations, reinstate the ousted employees, and bargain with the Union. It further ordered the Company to make the employees whole for their loss of earnings, but only for the period commencing with the date of the Supplemental Decision and Order (R. 25).

Both the Union and the Company filed petitions for review in the District of Columbia Circuit, each seeking review of those portions of the decision unfavorable to it. The Board cross-petitioned for enforcement of its order. The Court affirmed the Board's decision, and enforced the order (R. 171, 179). Timely petitions for rehearing were denied.

Both the Company and the Union filed petitions for certiorari in this Court. The Union's petition was denied, *East Bay Union of Machinists* v. *NLRB*, 375 U. S. 974 (1964) but the Company's petition was granted in part (R. 183-84), presumably because of the conflict between the decision below and the decision of the Eighth Circuit in *NLRB* v. *Adams Dairy, Inc.*, 322 F. 2d 553 (1963).

SUMMARY OF ARGUMENT

I

A. Reduced to its bare essentials, the question in this case is whether an employer who believes that the labor costs under his collective bargaining agreement are too high is required to try to solve his problem by bargaining with his employees' union, or whether he may solve it unilaterally by waiting until, in his view, the existing collective bargaining agreement expires and then simply terminating the employees and engaging a contractor whose employees are willing to do the same work under less costly terms and conditions of employment.

Thus put, the question almost answers itself. The purpose of the National Labor Relations Act is to foster collective bargaining as a method by which the interest of em-

ployees in maximum pay and security and good working conditions, and the interest of employers in minimum costs and maximum profits, can be accommodated in a manner which gives recognition and expression to both interests. By imposing its own solution unilaterally, the Company has circumvented the collective bargaining process. The result, of course, is that the solution it adopted took care of the Company's problem without taking account of, or making provision for, the interests of the employees.

It is at least possible that collective bargaining might have provided a mutually satisfactory solution that would have spared the employees their jobs. At the very least, the Act requires that an effort be made to find such a solution before the employer may take unilateral action.

The fact that the contracting out in this case was simply a device for changing the terms and conditions of employment under which the maintenance work was to be performed demonstrates, in a particularly dramatic fashion, the manner in which the policies of the Act may be thwarted if the Company's argument that contracting out is not a matter for bargaining were sustained. But in the last analysis, the chief reason why contracting out is a matter about which bargaining is required is that when an employer contracts out work, he thereby reduces the number of jobs or the amount of work available to employees in the bargaining unit. And the matter of what work, or what jobs, will be available to employees is plainly one of their "terms and conditions of employment" within the meaning of the Act.

This Court has already held, in *Order of Ry. Telegraphers* v. *Chicago & N.W.R.R.*, 362 U. S. 330 (1960), that the question of whether or in what circumstances jobs may be eliminated is a matter "concerning terms and conditions of employment" within the meaning of the Norris-LaGuardia Act, and a matter within the area of "rates of pay, rules, and working conditions" about which bargaining is required by the Railway Labor Act. There is no basis for reaching any

different result under the essentially similar phrase, "terms and conditions of employment," as used in the National Labor Relations Act.

Bargaining about such matters is common throughout industry. Indeed, in this age of rapid technological change and chronic unemployment, the preservation of jobs and the promotion of job security have become a primary objective of most unions. If collective bargaining is to perform its function of reconciling the conflicting interests and needs of labor and management, it is essential that the Act be construed to require bargaining about contracting out or other employer actions directly affecting the amount of work, or the number of jobs, available to employees.

B. Contrary to the arguments of the Company and the *amici*, the decision in this case is not contrary to, but is consistent with, prior decisions of the Board and the courts, including this Court.

As early as 1941, the Board held that it was a violation of the duty to bargain for an employer unilaterally to transfer work from one plant to another—an action essentially similar to contracting out—without first bargaining with his employees' bargaining representative. There have been several subsequent cases reaching the same result.

In 1946, the Board specifically held that an employer must bargain about the contracting out of bargaining unit work. That decision, too, was followed in several subsequent cases.

Most of the decisions which the Company relies on as precedent involved questions entirely different from that presented here. Only two of them seem to look in the opposite direction from that taken by the Board in the present case, and those two dealt primarily with other issues, and treated in only the most cursory manner the question of whether an employer must bargain before contracting work out, or terminating his operations. To the extent that those two cases are in conflict with the decision in the present case, they are also in conflict with all the other Board precedents,

as well as this Court's decision in the *Telegraphers* case.

This Court's decision in *Local 24, Int'l Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283 (1959), 362 U. S. 605 (1960) is also relevant. In that case, the Court held that a collective bargaining agreement restricting the right of certain employers to contract out work could not be invalidated by a state antitrust law, because it dealt with a subject matter about which the parties were required to bargain by the National Labor Relations Act.

C. The decision in this case is not only in accord with established precedent, it is in accord with collective bargaining practice. Bargaining about contractual standards to govern the contracting out of work is a matter of routine throughout American industry. As of 1959, according to a Labor Department study, some 378 of the 1687 collective bargaining agreements covering 1,000 or more workers contained some express restriction on contracting out. And the absence of such an express provision in other agreements, of course, does not indicate that the parties had not bargained about contracting out, but only that they had not agreed on a contractual provision dealing with it. In the basic steel industry, for example, the union has tried for years to obtain an express restriction on contracting out, but not until 1963 was such a provision actually negotiated.

In addition, contracting out has been the subject of many grievances. There are more than 100 published arbitration awards dealing with such grievances, and most of them hold that even in the absence of any express language in the agreement, the very existence of a collective bargaining agreement limits to some extent management's right to eliminate jobs covered by the agreement by contracting work out.

D. The argument of the Company and the *amici* that to require employers to bargain about contracting out would impose an unreasonable burden on management is without merit. It is based primarily on the false assumption that

the only way the duty could be discharged is by bargaining on an *ad hoc*, case-by-case basis each time work is to be contracted out. While this is one way of handling the matter, any employer who considers that approach impractical is free to negotiate a general contractual provision governing contracting out. As we have indicated, such provisions are common, and where they exist, management is free to contract out work without prior bargaining, subject only to its contractual obligation to comply with the agreement. Indeed, an employer who believes that it is absolutely essential for the efficient conduct of his business to be free of all restrictions on contracting out may insist on a contractual provision giving him the right to contract out work as the price of a collective bargaining agreement.

And even in the absence of either an express or implied agreement on the principles to govern contracting out, an employer need not bargain whenever work is to be contracted out. The question in every case is whether the employer's action constitutes a change in terms and conditions of employment—*i.e.*, a change in the status quo. If an employer has as a matter of practice contracted out certain types of work in certain circumstances, then that practice is the existing condition of employment, and bargaining is not required each time action is taken which is in accord with that practice.

Nor does the decision in this case imply that employers must bargain about every management decision which may remotely affect employees, or the amount of work in the bargaining unit. The price of an employer's product may ultimately affect the volume of business he will do, and thus the amount of work his employees have, but the decision to raise or lower prices is not a decision to increase or decrease the amount of work available to employees. On the other hand, a decision to contract work out is a decision to take work from employees, and is therefore subject to the duty to bargain.

E. Section 8(e) has no bearing on this case. As the legislative history makes clear, it was intended, like the almost identical language in Section 8(b)(4)(B), to deal with secondary boycotts.

II

The Board's remedial order in this case, requiring the Company to resume its maintenance operations and reinstate employees with partial back pay, is valid and proper. The Act gives the Board broad discretion to require an employer who has committed an unfair labor practice to "take such affirmative action, including reinstatement of an employee, with or without back pay, as will effectuate the policies of the Act." The Board's customary policy in cases involving unilateral changes in terms and conditions of employment has been to require the employer to reinstate the *status quo ante,* and to make employees whole for any financial loss which resulted from the unilateral action. The Board's order in this case is simply an application of that policy.

The ideal remedy, of course, would be to create the situation which would have resulted from bargaining, had the employer bargained. Since there is no way of knowing what that situation would have been, however, the only feasible thing to do is to put the parties back in the position they were in originally, and then let bargaining take its course.

It cannot be assumed that bargaining would have resulted in an impasse, and that the employer would ultimately have contracted out the work in any event. The entire Act is based on the premise that collective bargaining is not a fruitless ritual, but rather is a process through which labor and management can work out mutually acceptable solutions to their common problems.

The likelihood that bargaining would have produced a solution is particularly great in this case, since the sole reason

for the contracting out was the Company's view that the existing terms and conditions of employment were too costly. This is precisely the kind of problem which can be resolved through collective bargaining.

The fact that restoration of the status quo may involve some inconvenience, trouble and expense to the Company argues for, rather than against, the Board's order. If the Board simply ordered bargaining, the Union would have the task of persuading the Company to undertake this inconvenience, trouble and expense. This would make the job of working out a mutually agreeable solution immeasurably more difficult. Indeed, that is a principal reason why employers are required to bargain before making changes in terms and conditions of employment. Obviously, any effective remedy for the violation in this case would have to eliminate the cost and inconvenience of restoring the status quo as a factor to be considered in the bargaining.

The fact that a remedy may be costly does not make it punitive. A remedy is punitive only if it imposes a burden which cannot be justified as necessary or proper to effectuate the purposes of the Act.

The provision in Section 10(c) of the Act prohibiting reinstatement of employees who have been discharged for cause, on which the Company relies, is not applicable here. That provision was designed to prevent the Board from reinstating employees who had been discharged for misconduct, even where the misconduct was connected with union activities. In this case, the employees plainly were not discharged for misconduct. As the Board held, their "loss of employment stemmed directly from their employer's unlawful action in bypassing their bargaining agent." The Board's order is thus well within its statutory authority to provide a remedy which will effectuate the policies of the Act.

ARGUMENT

I. THE COMPANY VIOLATED SECTION 8(a)(5) WHEN IT TERMINATED ALL OF THE EMPLOYEES IN THE BARGAINING UNIT AND CONTRACTED OUT THEIR WORK WITHOUT BARGAINING WITH THE UNION.

A. *Both the Language and the Purpose of the Act Compel the Conclusion That Contracting Out Is a Matter Subject to the Duty to Bargain.*

Reduced to its bare essentials, this case presents the following problem. An employer, who believes that the labor costs under his collective bargaining agreement are too high, is confronted with new bargaining demands by the union representing his employees which would result in even higher costs. Instead of attempting to solve this problem through collective bargaining, the employer seeks out a contractor who has available a group of employees willing to work under less costly terms and conditions than the employer's own employees. The contractor offers the employer a cost-plus contract, under which the contractor would perform the work with his own employees, but with the employer's tools and equipment and under the employer's direction. May the employer, in these circumstances, wait until, in his view,[1] the existing agreement with the union expires and then, without bargaining, terminate his own employees, and engage the contractor to perform their work? Or must he first attempt to solve his labor cost problem through the processes of collective bargaining, and not take unilateral action unless the bargaining results in an impasse?

---

[1] The question of whether the contract expired, or whether it remained in effect subject to modification in accordance with the Union's reopening notice, is now being litigated in an action brought by the Union in the United States District Court for the Northern District of California. A motion to dismiss the complaint has been denied, and an interlocutory appeal is pending in the Ninth Circuit.

Thus put, the question almost answers itself. In substance, if not in form, the Company has simply changed the terms and conditions of employment under which its maintenance work will be performed. The Act, of course, prohibits an employer from making such changes directly without bargaining with his employees' union. *NLRB* v. *Katz*, 369 U. S. 736 (1962). And if the purposes of the Act are to be carried out, the necessity for bargaining is just as great when the employer accomplishes the same result indirectly, through the device of contracting the work out.

The fundamental purpose of the Act, after all, is to foster collective bargaining as a method by which the interest of employees in maximum pay and security and good working conditions, and the interest of employers in maximum profits and minimum costs, can be accommodated in a manner which gives recognition and expression to both interests. By contracting out the maintenance work without bargaining, the employer has totally evaded the collective bargaining process which the Act established for the precise purpose of dealing with the type of problem which this case involved. And in so doing, of course, the Company solved *its* problem in a manner which utterly failed to take account of, or make provision for, the *employees'* interest.

If the Company, before taking action, had attempted to resolve its problem through collective bargaining, it is at least possible that an agreement might have been reached which would have obviated the necessity of contracting out the work, and thus spared the employees' jobs. Surely, for example, Fibreboard would not have contracted out the work if the Union had been willing to agree to terms and conditions of employment as favorable to management as those which Fluor's employees were willing to accept. There is, of course, no way of knowing whether a mutually acceptable solution would have been found. But the Act requires, at the very least, that the Company make the effort to find one before imposing its own solution unilaterally.

We do not mean to suggest that the Company's obligation to bargain in this case arose solely because the contracting out involved here happened to be simply a device for changing the terms and conditions of employment under which the maintenance work was to be performed. Rather, we emphasize this fact because we believe it demonstrates, in a particularly dramatic way, the manner in which the policies and purposes of the Act would be thwarted if the Company's argument, that contracting out is not a subject about which employers must bargain, is sustained. In the final analysis, however, the fact that contracting out may be used to undermine labor standards is only one reason, and perhaps not even the most important reason, why it must be subject to the statutory duty to bargain.

The main reason why employers are required to bargain about contracting out is, quite simply, that whenever bargaining unit work is contracted out, the number of jobs which otherwise would be available to employees in the bargaining unit is reduced. And the matter of what jobs or what work will be available to employees is plainly a matter within the area of "terms and conditions of employment" about which the Act requires bargaining.

The Company and the *amici* argue, in effect, that the statutory phrase "terms and conditions of employment" refers only to the terms and conditions under which work is to be performed, and not what work, or what jobs, the employer will make available to employees. Simply as a matter of interpreting the words of the statute, this is hardly a tenable argument. What work employees will be required to do, or what jobs will be provided to them, surely is one term or condition of their employment. And whatever doubt might otherwise exist on this question is removed by this Court's decision in *Order of Ry. Telegraphers* v. *Chicago & N.W.R.R.*, 362 U. S. 330 (1960).

In the *Telegraphers* case the railroad had requested permission from certain state public utilities commissions to dis-

continue a number of its stations. The union, which represented station agents, responded by proposing a contract clause which would state that no job "will be abolished or discontinued except by agreement between the carrier and the organization," and threatened to strike in support of this demand. The Seventh Circuit had directed that the strike be enjoined, on the ground that the union's proposal "is completely outside the ambit of 'rates of pay, rules or working conditions,' as those words are used in the Railway Labor Act." 264 F. 2d 254, 260. On that basis, the court concluded that the Norris-LaGuardia Act did not preclude the issuance of an injunction against the strike.

This Court reversed the Seventh Circuit. It held, first, that the strike could not be enjoined because it involved a "labor dispute" within the meaning of Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113(c), which defines a labor dispute as "any controversy concerning terms and conditions of employment." The Court stated:

> "Unless the literal language of this definition is to be ignored, it squarely covers this controversy. . . .
>
> "Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement. The change desired just as plainly referred to 'conditions of employment' of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that 'collective bargaining as to the length or term of employment is commonplace,' is not challenged." *Id.* at 335-36.

In addition, the Court held that the union's demand was

not unlawful, but rather was a legitimate subject for collective bargaining under Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, which requires bargaining with respect to "rates of pay, rules, and working conditions."

> "Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions.' " *Id* at 339.

The Company attempts to distinguish this decision on the ground that it did not involve the National Labor Relations Act. It can hardly be contended, however, that the phrase "terms and conditions of employment," as used in that Act, has a different meaning than the phrase "terms or conditions of employment," in Norris-LaGuardia or the phrase "rates of pay, rules, and working conditions" in the Railway Labor Act.

In recent years, the question of whether, or in what circumstances, jobs may be eliminated has been one of the most prominent issues in labor-management negotiations. The recent national railroad dispute over the elimination of the job of fireman nearly caused a national crisis, and ultimately was settled only by special legislation. In 1959, a major issue in the 116-day strike in the steel industry was management's demand that it be given greater freedom to eliminate jobs by reducing the sizes of crews in the steel mills. Recent labor disputes in the longshore industry have centered on the question of management's right to introduce automated equipment and thereby eliminate jobs. In the construction industry, so-called "jurisdictional" disputes over what work will be given to what crafts are in fact almost always disputes over which employer shall perform particular work, since the work of each craft is typically performed by a separate employer. And, as we shall show more

fully below, bargaining on the question of whether or in what circumstances management may contract out bargaining unit work is common throughout most of American industry.

If the position of the Company and the *amici* in this case were sustained, it would mean not only that employers could, at any time, unilaterally eliminate some or all of their employees' jobs, by contracting out their work or by other means. It would also mean that employers could lawfully refuse even to discuss with their employees' bargaining representatives any proposed agreement which would give employees a measure of job security by restricting management's right to contract out their work, or otherwise eliminate their jobs. It would mean, indeed, that any union which called a strike in support of such a proposal would be guilty of an unfair labor practice itself. *Cf. NLRB* v. *Wooster Div., Borg Warner Corp.*, 356 U. S. 342 (1958); *Local 164, Brotherhood of Painters* v. *NLRB*, 293 F. 2d 133 (D. C. Cir 1961)

Any such result would run directly counter to the purposes and policies of the Act. In this era of rapid technological change and chronic unemployment, one of the principal concerns of employees is job security. At one time in our history, the main goal of unions may have been solely to obtain higher pay, better hours, and more humane working conditions, although we doubt it. But, in any case, in today's society, although these goals still exist, a primary objective of most American unions is to obtain greater job security for the employees whom they represent. Workers today are at least as concerned with keeping their jobs as they are with the hours that they work or the pay they receive. In the words of this Court in the *Telegraphers* case, "in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment." 362 U. S. at 336. If collective bargaining is to serve its purpose of reconciling the conflicting needs and interests of labor and management, therefore, the Act

must be construed to require bargaining on such matters as what work employees will perform, what jobs will be available to them, and under what circumstances work may be withdrawn or jobs eliminated from the bargaining unit. Since contracting out is one way in which work is taken from employees, it must be one of the subjects about which bargaining is required.

There is nothing startling or radical in this result. The Company's brief attempts to give the impression that, prior to the decision in the present case, neither the NLRB nor the Labor-management community had ever dreamed that employers were obligated to bargain about such matters as the contracting out of work. In fact, as we shall show, it was the Board's original decision in this case, not its ultimate decision, which departed from prevailing law. And far from changing established collective bargaining practice, the decision in this case simply confirms that employers are legally required to bargain about subjects which they have in fact always bargained about.

B—Prior Decisions of the Board and the Courts, Including This Court, Establish That Contracting Out Is a Matter About Which Employers Are Required to Bargain.

The Company's brief, as well as the *amicus* briefs, are replete with statements suggesting that the Board's present decision constitutes a radical departure from precedent. Even if this were so, it would not, in itself, be a basis for reversing that decision. Surely this Court is not bound by prior decisions of the Board, and no one has suggested that the decision below is in conflict with any decision of this Court. And the Board itself has not only the right but the duty to overrule its own decisions when it becomes convinced that such action is necessary in order properly to carry out the language and purposes of the Act.

But in any event, the decision in this case is, in fact, wholly

in accord with the vast majority of the relevant prior decisions of the Board and the courts, including this Court.

As early as 1941, the NLRB held that an employer is obliged to bargain with his employees' representative before transferring work from one plant to another—an action which, of course, is essentially indistinguishable from contracting out. *Gerity Whitaker Co.*, 33 N.L.R.B. 393, 406-7 (1941), *enforced in pertinent respects*, 137 F. 2d 198 (6th Cir. 1942), *cert denied*, 318 U. S. 763 (1943). Although the Board found, in that case, that the employer transferred the work in order to defeat the union, it also found that, quite apart from the employer's unlawful motivation, the unilateral transfer violated the duty to bargain:

> "It is true that Gerity Whitaker had a contract with the Metal Polishers at the time of the transfer to Adrian. Its obligation to bargain with the Metal Polishers was, however, a continuing one, by virtue of the terms of the contract and the policy and provisions of the Act. That obligation was all the more important where the unilateral determination would cut off the tenure of employment of the employees and thereby undermine the contract and exclusive representative. The removal to Adrian was such a drastic and crucial change in Gerity Whitaker's employment conditions that the refusal to bargain, inherent in such removal, when presented as an accomplished fact, could not be cured by the bargaining that subsequently occurred in regard to the employment at Adrian of some employees laid off at Toledo, especially since the Geritys failed to carry out in full the understanding reached in connection with this negotiation." *Id* at 407

Subsequent to that decision, the Board has repeatedly held that an employer may not transfer work from one plant to another without bargaining with the union representing the affected employees. *E.g., Brown Truck & Trailer Mfg. Co.,*

106 N.L.R.B. 999 (1953); *Bickford Shoes, Inc.*, 109 N.L.R.B. 1346 (1954); *California Footwear Co.*, 114 N.L.R.B. 765 (1955), *enforced in pertinent part*, 246 F. 2d 886 (9th Cir. 1957); *Rapid Bindery, Inc.*, 127 N.L.R.B. 212 (1960), *enforced in part*, 293 F. 2d 170 (2d Cir. 1961).

The Company argues that these cases stand only for the proposition that the employer must bargain about "measures such as termination pay (wages) or the provision of other work (tenure of employment) designed to ease the impact of the decision upon his employees" (Br. 14-15), but not about the decision itself. It is true that, in the plant move cases, the main emphasis is on the employer's obligation to bargain concerning the transfer of employees to the new location. This is because in such cases the union is generally primarily concerned with providing transfer rights to the employees, rather than preventing the move altogether. But the essential holding of the cases, nevertheless, is that a plant move constitutes a change in terms and conditions of employment which an employer cannot unilaterally make without first bargaining with the union. Only a dictum in the Second Circuit's decision in *Rapid Bindery* suggests that the bargaining duty does not extend to the basic question of whether to move or not.

And any ambiguity in the plant move cases is removed by the Board's prior decisions dealing specifically with contracting out. In *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *reversed on other grounds*, 161 F. 2d 949 (6th Cir. 1947), the complaint alleged, *inter alia*, that the employer had "refused to bargain with the Union with respect to the continuance of a practice of sub-contracting certain production and maintenance work to private contractors." 70 N.L.R.B. at 511. The employer contended, as Fibreboard does here, that this was not a matter about which it was required to bargain. The Board held to the contrary, affirming a Trial Examiner's decision which stated in part the following:

"Without attempting generally to delimit the subject matter properly included within the scope of collective bargaining, it seems apparent that the respondent's system of sub-contracting work may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work, and hence more and more jobs, from the unit.

". . . It is the respondent's duty to sit down and discuss these matters with the Union when requested to do so. During such discussion it may develop, for example, that the Union will engage to supply sufficient skilled labor in the crafts in question, so that more work may be done by the respondent's employees and less by workers outside the unit; it might be that the respondent will convince the bargaining representative that there is no reasonable alternative to a continuation of the respondent's present practice in this respect; or some other and presently unthought of solution agreeable to both parties may suggest itself.

"On none of the issues now dividing the parties is the respondent compelled to reach an agreement with the Union. Much less, as the respondent's brief seems to imply, would it be required to accede *in toto* to the demands of the bargaining representative. The requirement is that the respondent consult with the Union and explore in good faith the possibility of reaching an agreement so that, in conformity with the purposes of the Act, the matter may be removed, so far as is possible, as a cause of industrial strife." *Id* at 518

In several subsequent cases, all decided long before the present case, the Board held that an employer violates the duty to bargain when he unilaterally contracts out his employees' jobs without first bargaining with their union. *Shamrock Dairy, Inc.*, 119 N.L.R.B. 998 (1957), *enforced*, 280 F. 2d 665 (D. C. Cir. 1960), *cert. denied*, 364 U. S. 892

(1960); *Brown-Dunkin Co.*, 125 N.L.R.B. 1379 (1959), *enforced*, 287 F. 2d 17 (10th Cir. 1961); *Smith's Van & Transport Co.*, 126 N.L.R.B. 1059 (1960). See also *Hughes Tool Co.*, 100 N.L.R.B. 208 (1952) (holding that the employer was not required to bargain about contracting out *because* the union had waived its right to bargain on that subject).

It is also noteworthy that, in the two other contracting-out cases which the Board decided around the same time as the present case, and which the Company also contends were a radical departure from prior law, the Trial Examiners had not only reached the same result as the Board reached but had expressed the view that their decisions were compelled by established law. Thus, in *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F. 2d 846 (5th Cir. 1963), the Trial Examiner, writing in 1960, two years before the Board decision in this case (and before the change in Board membership which the Company makes so much of), had held:

> "It is settled law that an employer's obligation to bargain in good faith encompasses the duty to afford his employees' bargaining agent an opportunity to negotiate about any contemplated change in any term or condition of employment. Plainly, the Respondent has not done so here; instead, under the guise of management prerogative, it presented the Union with a *fait accompli*, leaving nothing over which the Union could bargain. Such action was a clear rejection of the collective bargaining principle and constituted conduct in derogation of the Union's status as the majority representative of the Respondent's truckdrivers." 136 N.L.R.B. at 1040.

And in *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962), *enforcement denied*, 322 F. 2d 553 (8th Cir. 1963), *petition for certiorari pending, No. 25, This Term*, the Trial Examiner, also writing in 1960, stated:

". . . the Board has uniformly held that where, as here, an employer proposes to subcontract work performed by employees in a bargaining unit, he is first required to bargain collectively thereon with the bargaining representative of those employees [citing cases]. As the cited cases also establish, this requirement obtains even if the proposal is motivated by purely economic considerations." 137 N.L.R.B. at 823.

It is thus almost dishonest to say, as the Company does, that prior to the present decision the Board "repeatedly and consistently held that an employer was not required to bargain about a decision, motivated by legitimate business considerations, to contract out work or close or move his plant." (Br. p. 14) This becomes even more apparent when the cases cited by the Company in support of this statement are examined.

In *Brown McLaren Co.*, 34 N.L.R.B. 984 (1941), relied on by the Company, the employer contracted out certain work after having repeatedly sought from the union certain wage modifications which the Company had claimed were essential to enable it to continue the work in question on a profitable basis. After the Union had refused these requests, the company contracted out the work. The Board held:

"We think it was within the reasonable contemplation of the parties at the time the Union refused a modification in the wage provision that the respondent might subcontract or transfer the . . . work in question. Whatever duty the respondent had prior to September 21, 1937, to bargain with the Union for a wage reduction as a means of avoiding the necessity for such subcontracting or transfer, was discharged by the course of negotiations prior to September 21, 1937." *Id.* at 1006-1007.

The Board went on to explain that by the time the Union

requested further bargaining, it was simply too late, and that the company's subsequent transfer of certain additional work "was incidental to, and a direct result of the situation which impelled the removal or transfer of" the original work. "Under these circumstances," the Board said, the Company's refusal to negotiate "concerning the transfer or removal of operations from the Detroit to the Hamburg plant did not constitute a refusal to bargain collectively." *Id.* at 1007. Plainly, this is not a holding that the Company had no duty to bargain, but merely that it had discharged its duty.

Mahoning Mining Co., 61 N.L.R.B. 792 (1945), also relied on by the Company, did not even involve the question of whether an employer must bargain collectively about contracting out. That case arose only after the employer had contracted out the operation of certain mines, and the union representing the employer's employees had claimed that the employer must continue to bargain with it about the terms and conditions of employment of the contractor's employees. The Board's decision rejecting this argument seems clearly correct, and has no bearing whatever on the issues in the present case.

Celanese Corp., 95 N.L.R.B. 664 (1951), does contain some dicta in the Trial Examiner's decision which suggests that an employer need not bargain about contracting out. *Id* at 713. But the issue was not raised in that case: "the General Counsel does not contend that the Company refused to bargain upon the subject of granting the maintenance work to an independent contractor." *Id.* at 708. The issue was not discussed at all in the Board's opinion.

Similarly, in *National Gas Co.,* 99 N.L.R.B. 273 (1952), the Trial Examiner did say that the employer was not obligated to bargain about its decision to contract out work, but no exceptions were filed to this aspect of the Trial Examiner's decision and the Board thus did not pass on the issue at all. See *Id.* at 277.

This leaves, at best, only two isolated Board decisions which look in the opposite direction from that taken by the Board in the present case. *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971 (1952), *enforced sub. nom. NLRB* v. *Armato*, 199 F. 2d 800 (7th Cir. 1952); *Walter Holm & Co.*, 87 N.L.R.B. 1169 (1949). Both of these decisions were concerned primarily with other issues, and dealt in only the most cursory way with the question of whether an employer must bargain before discontinuing all or a portion of his business, or contracting out work. To the extent that they are in conflict with the present decision, they are also in conflict with all of the other Board decisions, cited above, which dealt much more extensively with these questions. And, as we have already demonstrated, they are in conflict with this Court's decision in *Order of Ry. Telegraphers* v. *Chicago & N.W.R.R.*, 362 U. S. 330 (1960).

Also relevant is this Court's decision in *Local 24, Int'l Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283 (1959), 362 U. S. 605 (1960). In its first opinion in that case, this Court held that an Ohio antitrust law could not be invoked to enjoin enforcement of an agreement between the Teamsters Union and a group of trucking companies which regulated the truck rental rates to be paid by the companies when their drivers provided their own trucks. The purpose of the agreement was to prevent the companies from paying to owner-drivers rates which would undercut those established for drivers who drove the employers' trucks. The Court held, citing the *Timken* case referred to above, that the agreement dealt with a subject matter about which the National Labor Relations Act required bargaining, and therefore could not be invalidated by state law. 358 U. S. at 294-95.

The same agreement also provided that hired or leased trucks, if not owner-driven, could be operated only by employees of the companies who were parties to the agreement, and it further required those companies to use their own

trucks before hiring extra equipment. This was, of course, an agreement restricting the companies' right to contract out work. After this Court's first decision, the Ohio court held that it could still enjoin enforcement of this aspect of the agreement, and the case thus came to this Court a second time. In its second opinion, this Court held that "these provisions are at least as intimately bound up with the subject of wages as the minimum rental provisions we passed on [previously]. Accordingly, as in the previous case, we hold that Ohio's antitrust law here may not be 'applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain.' "

It is thus clear that it is the Company's argument in this case, and not the decision of the Board and the court below, which flies in the face of established precedent.[2]

C—Collective Bargaining About Contracting Out Is a Matter of Routine Throughout American Industry.

In determining whether a particular subject matter is one about which unions and employers are required to bargain,

[2] At page 15 of its brief, the Company cites a number of cases in which the question was whether an employer had contracted out work in order to defeat union organization, in violation of Section 8(a)(3) of the Act. These cases, the Company argues, reflect the view that "the legality of a unilateral action in contracting out work or closing a plant . . . [depends] entirely upon the employer's motive. . . ." Since none of the cases referred to involved any question of whether the employer refused to bargain, they plainly cannot be regarded as authority for the proposition that contracting out is not a matter about which bargaining is required. It is worth noting, however, that Section 8(a)(3) prohibits only discrimination "in regard to hire, tenure of employment, *or any term or condition of employment* to encourage or discourage membership in a labor organization." Thus, the cases dealing with contracting out under Section 8(a)(3), to the extent that they are relevant at all, support our position, not the Company's, since they all assume that when an employer contracts out work to discourage union membership he is discriminating "in regard to a term or condition of employment."

a primary consideration obviously must be whether, as a matter of practice, unions and employers do in fact generally bargain about that subject. The Act, after all, was passed for the purpose of "encouraging the practice and procedure of collective bargaining." Section 1, 29 U.S.C. § 151. It would be ironic indeed for it to become a means by which employers might withdraw from the collective bargaining arena matters which they have historically bargained about.

In 1961, the Labor Department's Bureau of Labor Statistics published a study entitled *Subcontracting Clauses in Major Collective Bargaining Agreements* (Bulletin No. 1304). This study examined 1687 collective bargaining agreements covering 1000 or more workers, which constitute "virtually all agreements of this size in the United States." *Id.* at 2. It found that 378 of these agreements contained provisions which expressly limited the right of management to contract out work which had been or could be performed by the employees in the bargaining unit. These limitations took a variety of different forms. "A substantial number of agreements prohibited subcontracting when qualified in-plant workers were already on layoff or on part time, or when layoff or part time would result." *Id.* at 5. Others simply provided that the union would play some role in the decision to contract out—that role ranging all the way from a veto power to a simple right to be notified and consulted. Some specified certain conditions under which work could be contracted out—for example, where the employer himself does not have available the equipment or skills necessary to do the work in question. "A number of agreements differentiated between major or new construction, maintenance, and repair work and that which was 'normal' or 'routine.' Typically such clauses reserved normal work for in-plant workers and allowed major or new construction and repair to be contracted out. . . ." *Id.* at 8.

The fact that many of the agreements studied by the

Bureau of Labor Statistics did not deal expressly with contracting out does not mean, of course, that the parties to those agreements have never bargained about contracting out. The absence of a contracting out clause proves only that the parties have not agreed on such clause—not that they haven't bargained about it.

At the time the BLS study was conducted, for example, most of the collective bargaining agreements in the basic steel industry did not have any express provision governing contracting out. As the union which represents virtually all of the employees in that particular industry, we know for a fact that the subject had been discussed in contract negotiations for many, many years, and had been the subject of dozens of arbitration awards, but the parties had simply not been able to work out a mutually acceptable contract provision on contracting out. In 1963, however, after an intensive, year long study of contracting-out in the steel industry, the union and the major steel companies adopted an "Experimental Agreement" dealing with contracting out, as well as certain other matters affecting employment security. We have reprinted the contracting-out portion of this "Experimental Agreement" as an appendix to this brief, because we believe it illustrates the manner in which labor and management, through collective bargaining, can develop rules regulating contracting out which are acceptable to both sides, and responsive to their respective needs and interests. Other examples may be found in the BLS study, and in 2 BNA, Collective Bargaining Negotiations and Contracts 65: 181-188.

Moreover, collective bargaining as it is practiced in the United States does not end with the negotiation of an agreement. The day to day administration of the agreement, through the processing and arbitrating of "grievances," is an integral part of the bargaining process. And, as this Court has acknowledged, "contracting out work is the basis

of many grievances." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 584 (1960).

It is significant that almost all arbitration awards dealing with contracting out involve collective bargaining agreements which do not contain any express provisions on this subject. And in the vast majority of cases, the arbitrators have ruled that despite the absence of any express reference to contracting out, the collective bargaining agreement must be interpreted as restricting in some degree the right of management to contract out work which is covered by the agreement. See Crawford, *The Arbitration of Disputes over Subcontracting*, published by Bureau of National Affairs in Challenges to Arbitration: Proceedings of the Thirteenth Annual Meeting National Academy of Arbitrators p. 51 (1960); Dash, *The Arbitration of Subcontracting Disputes*, 16 Industrial & Labor Relations Review 208 (1963); Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum*, Id. at 221.

The fact that most arbitrators find implied limitations on the right of management to contract out work, even where contracting out is not expressly mentioned in the agreement, demonstrates the direct relationship between the question of whether or in what circumstances management may contract work and other "terms and conditions of employment." And the sheer number of published arbitration awards dealing with this subject demonstrates the extent to which it is a matter commonly dealt with in collective bargaining. According to the studies cited above, there are some 114 contracting-out cases reported in the Bureau of National Affairs' "Labor Arbitration Reports" between 1947 and 1962. And this is just a small fraction of the total number of awards which have been rendered on this subject, since the vast majority of awards are not published at all.

Thus, contrary to the contention of the Company in this case, a decision that contracting out is a mandatory subject

of bargaining will not radically change existing industrial relations practice, any more than it will radically change existing law.

D—The Duty to Bargain About Contracting Out Does Not Impose an Undue Burden Upon Management.

The Company and the *amici* contend that the decision in this case imposes an entirely unreasonable burden on management. They argue that it is simply impractical to require an employer to bargain with his employees' representative every time he wishes to contract out work. In addition, they claim that the reasoning of the present decision cannot logically be limited to contracting out, but would apply equally to virtually every managerial decision which in some manner affects employees. Thus the Company says "the Board's decision means that the pace at which an employer does business will be limited to the pace set in bargaining by the union or unions with which he must deal" (Br. 22). The Brief for the National Association of Manufacturers even goes so far as to predict that the present decision may mean the end of the free enterprise system, and the downfall of the economy! (Br. 12-13)

These arguments are based on a number of fallacies. The first and most basic of these is the false assumption that the only way management may discharge its obligation to bargain concerning contracting out is on a case-by-case basis each time contracting out is contemplated. This is, of course, one way of handling the matter. But if an employer wishes to be free of the duty to bargain each time the question of contracting out comes up, the solution is to negotiate a general provision governing contracting out as part of an over-all collective bargaining agreement. As we have seen, such provisions are quite common. And, where they exist, the employer is free to act unilaterally, subject only to his contractual obligation to comply with the terms of the agreement. *Cf. Tidewater Associated Oil*

Co., 85 N.L.R.B. 1096 (1949); *Allied Mills, Inc.*, 82 N.L.R.B. 854 (1949).

It is precisely because it is impractical to bargain on every day-to-day change in terms and conditions of employment that collective bargaining agreements are negotiated. Obviously, no business could operate if there had to be extended collective bargaining every time any employee was laid off, promoted, transferred, or terminated, or every time management changed the duties of a job, assigned overtime work, called out an employee between shifts, etc. For that reason, it is customary to prescribe rules governing these matters in a collective bargaining agreement.

> "One might conceive of the parties engaging in bargaining and joint determination, without an agreement, by considering each case as it arises and disposing of it by *ad hoc* decision. But this is, of course, a wholly impractical method, particularly for a large enterprise. So the parties seek to negotiate an agreement to provide the standards to govern their future action." Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1003 (1955)

Indeed, if an employer believes that it is absolutely essential for the efficient conduct of his business to be free of all restrictions on contracting out, he is entitled to insist on a contractual provision giving him the right to contract out work as the price of a collective bargaining agreement. See, *e.g.*, *Peerless Distributing Co.*, 144 N.L.R.B. No. 142, 54 L.R.R.M. 1285 (Nov. 13, 1963); *Hughes Tool Co.*, 100 N.L.R.B. 208 (1952). And even where a union is unwilling to give the employer *carte blanche*, there is no reason why the parties cannot reach a reasonable accommodation on this issue just as they do on the hundreds of other difficult questions which have yielded to the collective bargaining process

In short, the argument that it is impractical for an employer to bargain with a union each time he contemplates contracting out work is not an argument for holding that contracting out is not a matter for bargaining. Rather, it is an argument for dealing with contracting out by means of a contractual provision, as other terms and conditions of employment are usually dealt with, rather than on an *ad hoc* basis. This is a choice which the law leaves entirely to the parties.

Moreover, even in the absence of either an express or an implied agreement on the principles to govern contracting out—as where there is no collective bargaining agreement at all—the decision in this case does not necessarily mean that an employer must always bargain before contracting out work. That is the second fallacy in the Company's argument. The question in every case is whether the employer's action constitutes a change in terms and conditions of employment—*i.e.*, a change in the status quo. If as a matter of practice the employer has always contracted out a certain type of work, that practice is part of the existing terms and conditions of employment.

Again, the situation is no different with respect to contracting out than it is with respect to all other bargainable matters. An employer, for example, may not make unilateral changes in wages. However, if the existing practice is to pay employees at one rate when they do one type of work and at another rate when they do another type of work, it is not necessary for the employer to bargain each time he changes an employee's rate of pay as a result of a change in work assignment. So long as the employer changes the wage rates in accordance with the existing practice, he is not changing the terms and conditions of employment.

Similarly, suppose that a trucking company which has its own repair shop for the performance of routine maintenance work on its trucks has always sent its trucks to an out-

side garage for major engine overhauls. In that situation, the employer need not bargain every time a truck is sent out for an engine overhaul, even though that work could be performed by his own mechanics. The practice of contracting out the engine overhaul work would be the existing condition of employment, and the duty to bargain about it would arise only if and when the union requested a change in that practice.

Nor does it follow from the decision in the present case that the duty to bargain extends to every managerial decision which may affect employees, regardless of how remote or indirect that effect might be. That is the third fallacy of the Company's argument. Such decisions as whether to increase or decrease prices, whether to expand or reduce research and development activities, or whether to seek new capital may ultimately have an impact on employees, but they do not immediately and directly eliminate jobs or otherwise change the terms and conditions of employment. Contracting out, as we have said, is a matter for collective bargaining not because it may indirectly affect terms and conditions of employment, but because it directly results in the diminution of the number of jobs or amount of work available to employees in the bargaining unit.

Admittedly, on the same reasoning as is applicable to contracting out, the duty to bargain does extend to such matters as whether or under what conditions the employer may introduce new equipment, *Renton News Record,* 136 N.L.R.B. 1294 (1962), whether or under what conditions the employer may discontinue part or all of his business, *Lori-Ann of Miami,* 137 N.L.R.B. 1099 (1962), or whether or under what conditions the employer may transfer work from one plant to another, *Edward Axel Roffman Associates,* 147 N.L.R.B. No. 87, 56 L.R.R.M. 1268 (1964). All of these are questions which directly involve the terms and conditions of employment. But it is no more unreasonable or burdensome to require an employer to bargain about

these matters than it is to require him to bargain about the contracting out of work. And bargaining on them, also, is essential if collective bargaining is going to serve its fundamental purpose of providing a machinery for the adjustment of the conflicting needs and interests of employees and their employers.

E—Section 8(e) Has No Bearing on this Case.

The National Association of Manufacturers, in its *amicus* brief, makes one additional argument. It contends that contracting out is not a matter about which employers must bargain because any agreement which would restrict contracting out would violate Section 8(e) of the Act, 27 U. S. C. § 158(e). Section 8(e) makes unlawful any contract in which an employer agrees with a union to cease doing business with another employer. The language is directly parallel to Section 8(b)(4)(B), which prohibits certain action to force an employer to cease doing business with another employer. The object of both provisions is the same: to prohibit secondary boycotts. Section 8(b)(4)(B), while prohibiting a union from engaging in a strike or picketing against a "neutral" employer to force him to stop doing business with another employer with whom the union has a dispute, does not prevent the union and the neutral employer from making an agreement which would have the same effect. Section 8(e), which was added in 1959, was simply designed to prohibit these so-called "hot cargo" agreements. The portions of the legislative history cited in the NAM's brief makes this clear.

To construe this attempt to plug an alleged loophole in the secondary boycott provisions of the Act as prohibiting any limitation on the contracting out of work would constitute the same kind of unthinking literalism as construing Section 8(b)(4)(B) as a prohibition of all picketing. But, as this Court has said, Section 8(b)(4)(B) "could not be literally construed; otherwise it would ban most strikes his-

torically considered to be lawful, so-called primary activity." *Local 761, International Union of Electrical Workers* v. *N.L.R.B.*, 366 U. S. 667, 672. Instead, the "impact of the section was directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.'" *Id.* at 672. "The substantive evil condemned by Congress in §8(b)(4) is the secondary boycott. . . ." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U. S. 694, 705. This, and this alone, was the substantive evil also condemned by Congress in Section 8(e)

Nor do the provisos in Section 8(e) which exempt certain agreements in the construction and garment industries relating to the subcontracting of work suggest that all other agreements dealing with subcontracting are prohibited. The customary agreements in the garment and construction industry, which the statute is intended to protect, are those which prohibit the subcontracting of work to employers who do not have a union contract. In the absence of the provisos, such agreements might be regarded as a form of "hot cargo" agreement subject to the statutory ban, since they are intended to deprive non-union employers of work, not to protect bargaining unit jobs. But an agreement which prohibits or restricts contracting out not for the purpose of denying someone else the work, but for the purpose of protecting the jobs of employees in the bargaining unit, is completely outside the scope of Section 8(e).

II. THE BOARD'S REMEDIAL ORDER REQUIRING FIBREBOARD TO RESUME ITS MAINTENANCE OPERATIONS AND REINSTATE EMPLOYEES WITH PARTIAL BACK PAY IS VALID AND PROPER.

In addition to challenging the merits of the Board's decision in this case, the Company contends that the Board's remedial order requiring resumption of the Company's

maintenance operations and reinstatement of the terminated employees with partial back pay is punitive and in excess of the Board's authority. As we shall show, however, this remedy is well within the Board's discretion, and indeed is the only remedy which could effectively carry out the purposes of the Act.

The Act provides, in Section 10(c), 29 U. S. C. § 160(c), that when the Board finds that an unfair labor practice has been committed it shall, in addition to issuing a cease and desist order, require the offender "to take such affirmative action including reinstatement of an employee, with or without back pay, as will effectuate the policies of the Act." This section has been held to confer broad discretion on the Board "to mould remedies suited to practical needs." *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 351-52 (1953). See also *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 348 (1938).

The Board has frequently been called upon to fashion a remedy for cases, such as the present one, in which the violation consisted of a unilateral change in terms and conditions of employment. The Board's "customary policy" in such cases is to require the employer to restore the *status quo ante*, and to make the employees whole for any loss of pay:

> "It is the Board's customary policy to direct a respondent-employer to restore the status quo where he has taken unlawful unilateral action to the detriment of his employees. Such an order is warranted to prevent the wrongdoer from enjoying the fruits of his unfair labor practices and gaining an undue advantage at the bargaining table." *Herman Sausage Co.*, 122 N.L.R.B. 168, 172 (1958), *enforced*, 275 F. 2d 229 (5th Cir. 1960).

In applying this policy the Board has ordered employers to reinstate employees who lost their jobs as a result of a unilateral change in a seniority system, *West Boylston Mfg.*,

Co., 87 N.L.R.B. 808 (1949), to restore an incentive system unilaterally discontinued, *John W. Bolton*, 91 N.L.R.B. 989 (1950), to resume payment of commissions unilaterally discontinued, *Press Co.*, 121 N.L.R.B. 976 (1958), to reinstate a unilaterally discontinued pension plan and restore an insurance plan and wage rates which had been unilaterally revised, *Cascade Employers' Assn.*, 126 N.L.R.B. 1014 (1960), to restore a system of calculating overtime pay which the employer had unilaterally changed, *Marcus Trucking Co.*, 126 N.L.R.B. 1080 (1960), *enforced*, 286 F. 2d 583 (2d Cir. 1961).

The Board's order in the present case is nothing more than an application of that same policy. Indeed, the Board, if anything, has erred on the side of the Company, by failing to follow its usual pattern of awarding full back pay to the employees. In this case, the Board has exonerated the employer from back pay liability for the period prior to the Board's Supplemental Decision and Order. (R. 25-26).

Ideally, of course, the appropriate remedy would be to require the employer to create the situation which would have resulted from bargaining had the employer not acted without bargaining. But since there is no way of knowing what that situation would have been, the only feasible solution is to put the parties in the position they were in when the violation occurred, and then let bargaining take its course.

Obviously, it cannot be presumed that bargaining would have been fruitless. While it is conceivable that the parties might not have been able to reach an agreement, and that the Company would have contracted out its maintenance work after a bargaining impasse, it is far more likely that bargaining would have led to some solution more satisfactory to the employees. The keystone of the Act, after all, is the assumption that through collective bargaining the parties can reach agreements which maximize their respective interests.

> "Participating in [collective bargaining] debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strength or weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions." Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1412 (1958).

The likelihood that good faith bargaining would have produced a solution which would have spared the employees' jobs is particularly great in the circumstances of this case. As we have seen, the Company contracted out its maintenance work solely because it felt that the terms and conditions of employment which the Union had established through collective bargaining were too costly. If the employer had originally confronted the Union with the prospect that the entire work force would be terminated unless some reduction in labor costs was achieved, it is highly unlikely that the Union would have turned a deaf ear. Contrary to popular belief, unions are rarely so short-sighted as to refuse to try to accommodate an employer who can demonstrate that he has a real economic problem, particularly when their jobs are at stake. "Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions." *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)

The Company argues that there is a considerable amount of inconvenience, trouble and expense involved in resuming its discontinued maintenance operations. To the extent that this is so, it argues for, rather than against, the Board's order. For if the Board simply ordered the parties to bargain, without first restoring the *status quo ante*, the Union would have the task of persuading the Company to undertake that

inconvenience, trouble and expense. This would make the job of working out a mutually acceptable solution immeasurably more difficult. Indeed, that is a principal reason why employers are required to bargain *before* making changes in terms and conditions of employment. Obviously, any effective remedy for the violation in this case would have to eliminate the cost and inconvenience of restoring the status quo as a factor to be considered in the bargaining.

It is this same reasoning, of course, which justifies the award of back pay in cases such as this. Unless the Board awards back pay, the union will have to attempt to make the employees whole in collective bargaining. This also imposes a very heavy burden on the union which it would not have had but for the employer's violation.

The fact that a remedy may be costly to an employer does not, of course, make it "punitive." For example, the common remedy for a discriminatory discharge is reinstatement with back pay of the employee who was wrongfully discharged. Normally, the employer will have replaced the discharged employee, so that the result of the back pay order is that the employer has had to pay double wages. But that double liability is one which the employer has brought upon himself by his wrong, and since it is essential to the effectuation of the policies of the Act, it is not punitive. A remedy is punitive, this Court has said, only when it is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB,* 319 U. S. 533, 540 (1943). See also *NLRB v. Seven-Up Bottling Co.,* 344 U. S. 344 (1953); *Local 60, Carpenters* v. *NLRB,* 365 U. S. 651 (1961).

In some situations, of course, the Board has found that restoration of the *status quo ante* is impractical. For example, in *Renton News Record,* 136 N.L.R.B. 1294 (1962), the Board declined to require the employer to resume an operation which was obsolete. In the present case, however, the Board properly found that there were no excep-

tional circumstances which would justify a departure from its "customary policy."

> "We do not believe that requirement [resumption of the maintenance operations] imposes an undue or unfair burden on Respondent. The record shows that the maintenance operation is still being performed in much the same manner as it was prior to the subcontracting arrangement. Respondent has a continuing need for the services of maintenance employees; and Respondent's subcontract is terminable at any time upon 60 days notice." (R. 25 n. 19).

The Company argues that the Board's order in this case, in so far as it provides for reinstatement of employees with back pay, violates that portion of Section 10(c) which states that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." This argument is totally without merit. Discharge for cause usually means discharge for misconduct, and the legislative history of this sentence in Section 10(c) demonstrates clearly that that is the meaning which Congress intended those words to bear. The purpose of that sentence, which was added to the Act in 1947, was to "put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H. Rep. No. 245, 80th Cong., 1st Sess. 42 (1947). Or, as stated in the Conference Report:

> "Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities,

> contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon* v. *N.L.R.B.*, 153 Fed. (2) 480), will not be entitled to reinstatement." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947).

Plainly, the employees involved in the present case were not discharged for misconduct. Their "loss of employment stemmed directly from their employer's unlawful action in bypassing their bargaining agent." (R. 25).

Thus, the Board's remedial order is well within its broad statutory authority to effectuate the purposes of the Act.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Ave., N. W.
Washington, D. C. 20036
JAY DARWIN
Darwin, Rosenthal & Leff
68 Post Street
San Francisco, California

Attorneys for
United Steelworkers of America

APPENDIX

Excerpt from Agreements Between United Steelworkers of America and Certain Major Steel Producing Companies.*

Experimental Agreement

The following provisions set out below shall be effective for the period August 1, 1963 through December 31, 1964, for experimental purposes.

A. *Contracting Out*

The parties have existing rights and obligations with respect to various types of contracting out. In addition, the following supplements protections for bargaining unit employees or affirms existing management rights, whichever the case may be, as to those types of contracting out specified below:

1. (a) Production, service, and day-to-day maintenance and repair work within a plant as to which the practice has been to have such work performed by employees in the bargaining unit shall not be contracted out for performance within the plant, unless otherwise mutually agreed pursuant to paragraph 4.

(b) If production, service, and day-to-day maintenance and repair work has in the past been performed within a plant under some circumstances by employees in the bargaining unit and under some circumstances by employees of contractors, or both, such practice shall remain in effect with respect to such work performed within the plant, unless otherwise mutually agreed pursuant to paragraph 4.

(c) Production, service, and day-to-day maintenance and

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* Most of the nation's steel companies have adopted the agreement which is represented here. Among them are: United States Steel Corp., Bethlehem Steel Co., Republic Steel Corp., Jones and Laughlin Steel Corp., Inland Steel Co., Armco Steel Corp., Youngstown Sheet and Tube Co., Wheeling Steel Corp., Pittsburgh Steel Co., Colorado Fuel and Iron Corp., and Great Lakes Steel Corp.

repair work within a plant as to which the practice has been to have such work performed by employees of contractors may continue to be contracted out, unless otherwise mutually agreed pursuant to paragraph 4.

2. Maintenance and repair work performed within the plant, other than that described in paragraph 1, and installation, replacement and reconstruction of equipment and productive facilities, other than that described in paragraph 3, may not be contracted out for performance within the plant unless contracting out under the circumstances existing as of the time the decision to contract out was made can be demonstrated by the Company to have been the more reasonable course than doing the work with bargaining unit employees, taking into consideration the significant factors which are relevant. Whether the decision was made at the particular time to avoid the obligations of this paragraph may be a relevant factor for consideration.

3. New construction including major installation, major replacement and major reconstruction of equipment and productive facilities at any plant may be contracted out, subject to any rights and obligations of the parties which, as of the beginning of the period specified above, are applicable at that plant.

4. (a) At each plant a regularly constituted committee consisting of not more than four persons (except that the committee may be enlarged to six persons by local agreement), half of whom shall be members of the bargaining unit and designated by the Union in writing to the Plant management and the other half designated in writing to the Union by the Plant management, shall attempt to resolve problems in connection with the operation, application and administration of the foregoing provisions.

(b) In addition to the requirements of paragraph 5 below, such committee may discuss any other current problems with respect to contracting out brought to the attention of the committee.

5. The Union committee members will be given notice by the Company members, when the Company believes it should have significant items of work performed in the plant by outside contractors. Should the Union committee members believe discussion to be necessary, they shall so request the Company members in writing within three days (excluding Saturdays, Sundays, and Holidays) after receipt of such notice and such a discussion shall be held within three days (excluding Saturdays, Sundays, and Holidays) thereafter. Should the committee resolve the matter, such resolution shall be final and binding. Should a discussion be held and the matter not be resolved or in the event a discussion is not held, then within thirty days from the date of the Company's notice a grievance relating to such matter may be filed under the grievance and arbitration procedure. Should the Company committee members fail to give notice as provided above, then not later than thirty days from the date of the commencement of the work a grievance relating to such matter may be filed under the grievance and arbitration procedure.

6. Any grievance relating to contracting out which occurs after June 20, 1963, and prior to August 1, 1963, shall be subject to the provisions of paragraph 1 and 2 above.

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